

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
Facilitating the Provision of)	
Spectrum-Based Services to Rural Areas and)	WT Docket No. 02-381
Promoting Opportunities for)	
Rural Telephone Companies)	
To Provide Spectrum-Based Service)	
)	
2000 Biennial Regulatory Review)	
Spectrum Aggregation Limits)	WT Docket No. 01-14
For Commercial Mobile Radio Services)	
)	
Increasing Flexibility To Promote Access to and the)	
Efficient and Intensive Use of Spectrum and the)	WT Docket No. 03-202
Widespread Deployment of Wireless Services, and)	
To Facilitate Capital Formation)	

REPLY COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. (“DIRECTV”)¹ hereby offers the following Reply Comments in connection with the Commission’s Notice of Proposed Rulemaking in the above-captioned proceedings (“Notice”). Specifically, DIRECTV urges the Commission to reject the Comments of MDS America, Incorporated (“MDS”), which merely attempt to re-assert the same position that the Commission explicitly rejected only eight months ago in another proceeding.

MDS is a potential provider of Multichannel Video Distribution and Data Service (“MVDDS”), a new terrestrial wireless service that the Commission has created in the 12.2-12.7 GHz band (“the 12 GHz band”), which has long been the downlink frequency band used by DBS

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, LLC, a licensee in the direct broadcast satellite (“DBS”) service, which is a wholly-owned subsidiary of Hughes Electronics Corporation.

operations on a primary basis.² By statute, MVDDS operations are not permitted to cause harmful interference with DBS customers' receipt of service.³

In the Commission's MVDDS proceedings, MDS advocated the exact same "two-tiered approach" to "increase the permissible operating parameters for MVDDS operations in rural areas" that it now advocates here.⁴ However, DIRECTV and EchoStar showed in those proceedings that the increases in MVDDS power and other technical changes proposed by MDS would cause harmful interference to DBS subscribers in rural America.⁵ And the Commission, in an effort to protect DBS subscribers from harmful interference, as well as to preserve flexibility for different types of MVDDS transmission systems, expressly refused to adopt MDS's proposal.⁶

The Commission did note that MDS's proposal might have technical merit in "certain very specific circumstances" that might justify a waiver of the MVDDS rules, and that once the agency "gains experience with MVDDS operations," it may in the future entertain requests to

² On July 18, 2002, DIRECTV filed in the United States Court of Appeals for the District of Columbia a Petition for Review of the Commission's underlying decision that sharing between DBS and MVDDS is possible, arguing that the authorization of MVDDS operations in the 12 GHz band exceeds the Commission's authority, is an abuse of discretion, is arbitrary and capricious, and is otherwise contrary to law. *DIRECTV, Inc. v. Federal Communications Comm'n and the United States of America*, D.C. Cir. (filed July 19, 2002). That appeal remains pending.

³ See Rural Local Broadcast Signal Act, Act of Nov. 29, 1999, Pub. L. 106-113, 113 Stat. 1501, 1501A-544-1501A-545.

⁴ Comments of MDS at 2; see Petition for Reconsideration of MDS, ET Docket No. 98-206 (June 14, 2002).

⁵ See Joint Opposition of DIRECTV, Inc. and EchoStar Satellite Corporation, ET Docket No. 98-206 (Sept. 3, 2002). This filing is attached hereto as Exhibit A for incorporation into the record of the current proceedings.

⁶ *Fourth Memorandum Opinion and Order*, ET Docket No. 98-206 (rel. April 29, 2003), at ¶ 87. The Commission also observed that MDS's proposal was problematic because it would require an imprecise, across-the-board definition of "rural area." *Id.*

modify the general MVDDS power limits.⁷ But absolutely nothing has changed in the eight months since the Commission rejected MDS's proposal; indeed, the Commission only now is in the midst of assigning MVDDS licenses by a process of competitive bidding,⁸ and there are no commercially-deployed MVDDS systems.

Although DIRECTV has grave doubts as to the feasibility of MDS's proposal in *any* circumstance, it is plain that MDS's re-packaging of identical arguments in these proceedings amounts to nothing more than a late-filed petition for reconsideration of the Commission's decision in the MVDDS *Fourth Memorandum Opinion and Order*, and therefore should be dismissed on a procedural basis. On the merits, however, the Commission must also recognize that this proceeding, in the final analysis, is about sustaining and improving "quality spectrum-based services in rural areas" in the United States.⁹ The basic nature of satellite programming delivery with nationwide coverage beams makes DBS and other satellite services critical components of the infrastructure that can and should be used to reach rural America. In this regard, MDS's proposal will cause real harm to rural DBS customers – a result emphatically not in the public interest. Thus, for all of these reasons, MDS's Comments and power limit proposal should again be rejected by the Commission.

⁷ *Id.*

⁸ The Commission's auction for MVDDS licenses, Auction No. 53, is currently in process.

⁹ *Notice* at ¶ 1.

Respectfully submitted,

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EXHIBIT A

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Parts 2 and 25 of the)	ET Docket No. 98-206
Commission's Rules to Permit Operation)	RM-9147
of NGSO FSS Systems Co-Frequency with)	RM-9245
GSO and Terrestrial Systems in the Ku-)	
Band Frequency Range;)	
)	
Amendment of the Commission's Rules)	
to Authorize Subsidiary Terrestrial Use)	
of the 12.2-12.7 GHz Band by Direct)	
Broadcast Satellite Licensees)	
and Their Affiliates; and)	
)	
Applications of BroadWave USA, PDC)	
Broadband Corporation, and Satellite)	
Receivers, Ltd. to Provide a Fixed Service)	
in the 12.2-12.7 GHz Band)	

JOINT OPPOSITION OF DIRECTV, INC.
AND ECHOSTAR SATELLITE CORPORATION

DIRECTV, Inc. ("DIRECTV")¹ and EchoStar Satellite Corporation ("EchoStar")
(collectively, the "DBS Operators") hereby jointly oppose the petitions for reconsideration of
MDS America, Incorporated ("MDS America") and Pegasus Broadband, Inc. ("Pegasus") filed
in the above-captioned proceeding. For the following reasons, these two petitions should be
denied.

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¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, LLC, a licensee in the Direct Broadcast Satellite ("DBS") service and a wholly-owned subsidiary of Hughes Electronics Corporation. DBS service is known internationally as Broadcasting-Satellite Service ("BSS") and the terms are used interchangeably herein.

I. INTRODUCTION & SUMMARY

As the Commission well knows, the DBS Operators have strongly opposed the creation of a new terrestrial Multichannel Video Distribution and Data Service ("MVDDS") in the 12.2-12.7 GHz band (the "12 GHz Band"), which is the primary spectrum that the DBS operators use to downlink programming to subscribers across the United States. The voluminous record in this proceeding to date demonstrates that the creation and licensing of a ubiquitously deployed terrestrial service in the 12 GHz Band would seriously degrade DBS subscribers' receipt of service. The DBS operators therefore have sought judicial review of the Commission's threshold decision in the *First Report and Order* in this proceeding to create the MVDDS service in the 12 GHz Band, and the Commission's concomitant finding that sharing between the DBS service and the new MVDDS service is feasible in that spectrum.² The DBS Operators also have sought reconsideration of the *Second Report and Order* in this proceeding, urging the Commission to revisit various aspects of its adopted technical and enforcement criteria that are intended to govern spectrum sharing between the DBS and MVDDS services.³

In this Opposition, the DBS Operators urge the Commission not to make the MVDDS interference problem exponentially worse by accepting the further relaxation of the interference standard urged by MDS America for "rural areas." MDS America dresses its proposal in the guise of promoting the availability of multichannel video programming distribution ("MVPD")

² See *First Report and Order and Further Notice of Proposed Rulemaking*, ET Docket No. 98-206 (rel. Dec. 8, 2000) ("First Report and Order"), at ¶¶ 13-19. EchoStar and DIRECTV each filed petitions for review of the *First Report and Order* in the D.C. Circuit on July 18 and July 19, 2002 (Docket Nos. 02-1235 & 02-1234). On August 29, 2002, the D.C. Circuit ordered that the appeal proceedings be held in abeyance pending the Commission's disposition of Pegasus's petition for reconsideration.

³ See *Joint Petition for Reconsideration of EchoStar Satellite Corporation and DIRECTV, Inc. for Reconsideration of the Second Report and Order*, ET Docket No. 98-206 (filed July 26, 2002).

service to rural consumers. In reality, however, MDS America's proposal will set back that goal dramatically. Even under the *Second Report and Order's* unjustly permissive interference standard, additional increases in MVDDS power and other technical changes proposed by MDS America would cause harmful interference to DBS subscribers in rural America. For that reason alone, MDS America's proposals would disserve the public interest as a policy matter. Indeed, MDS America will suffer no hardship from such denial since its technology admittedly already "easily conforms to the MVDDS technical rules the Commission has adopted."⁴ Nor does MDS America proffer any concrete tie between its proposals and the viability of MVDDS deployment. MDS America's petition should be denied.

The Commission should also reject the petition for reconsideration filed by Pegasus. Through a brief but tortured statutory construction of the Local TV Act,⁵ Pegasus essentially seeks to create a pool of only two potential applicants (Pegasus and Northpoint) that would be eligible to bid on MVDDS licenses when they are assigned by the Commission at auction next year.⁶ Pegasus's effort on this front has no basis in the text, legislative history or structure of the Local TV Act, and is antithetical to the policy goals of Congress and the Commission to disseminate MVDDS licenses among the widest pool of qualified applicants possible.

For these reasons, the DBS Operators request that the MDS America and Pegasus petitions for reconsideration be denied.

⁴ MDS America Petition at 4.

⁵ See Launching Our Communities Access to Local Television Act of 2000, Pub. L. No. 106-553, App. B., Tit. X § 1012, 114 Stat. 2762 ("Local TV Act").

⁶ The MVDDS auction is currently scheduled to begin on February 12, 2003. See Public Notice, "Auction of Multichannel Video Distribution and Data Services Licenses," DA 02-1258 (rel. May 24, 2002).

II. THE COMMISSION SHOULD NOT ESTABLISH HIGHER MVDDS TRANSMITTER POWER LIMITS IN RURAL AREAS AND SHOULD REJECT MDS AMERICA'S OTHER TECHNICAL PROPOSALS

The crux of MDS America's meandering petition is a proposal for a "two-tiered" limitation on the effective isotropic radiated power ("EIRP") for MVDDS systems that would essentially permit MDS America to "jack up" the power tremendously for MVDDS transmitters located in rural areas beyond the already overly permissive limits allowed by the *Second Report and Order*. MDS America spends many pages belaboring the difficulty of designing and deploying a terrestrial wireless service that would be economically viable in rural areas, and then touts radically higher MVDDS transmitter power limits as the solution to this problem. Furthermore, throughout MDS America's petition, the Commission is repeatedly assured that it can trust MDS America's "real-world"⁷ experience in deploying terrestrial systems "in the shadow of DBS systems – *without* causing harmful interference"⁸ to mitigate any DBS interference problems.

The DBS Operators address MDS America's claims and technical proposals below.

A. MDS America's Claims Of An International "Track Record" With Respect To Terrestrial-DBS Sharing Should Be Completely Discounted

The DBS Operators preliminarily wish to re-emphasize a point that has been made earlier in this proceeding⁹ but that is quite important for the Commission to understand in evaluating the credibility of MDS America's technical assertions here: MDS America's claims of a "real-world" track record with respect to DBS-MVDDS spectrum sharing are both specious and

⁷ MDS America Petition at 5.

⁸ *Id.* at 17 (emphasis in original).

⁹ See e.g., *Ex Parte* Letters of Michael K. Kellogg, counsel for Northpoint Technology, Ltd., dated May 9, 2001, and June 7, 2001 (de-bunking MDS America claims of international co-frequency sharing of its terrestrial technology with BSS service).

misleading. The DBS Operators have researched every case of purported sharing listed in MDS America's earlier Comments in this proceeding,¹⁰ and found that, in virtually all cases, there is no semblance of true terrestrial-BSS sharing. Exhibit 1 hereto addresses all of MDS America's purported examples of alleged co-existence between its terrestrial service and BSS operations. As the Commission can see, the vast majority of so-called "sharing" situations touted by MDS America in actuality have *no* co-frequency overlap with BSS frequencies in Regions 1 and 3 of the International Telecommunications Union's ("ITU's") BSS Plan.¹¹ Furthermore, it is well known that the nature of BSS and direct-to-home ("DTH") service in Regions 1 and 3 is quite different than the DBS service offered in the United States. Not only are the frequency bands and receive antenna sizes different, but because of the large number of small countries existing quite close together, satellite coverage beams are designed to cover most of the continent rather than individual countries. Ethnic programming, in many different languages, is broadcast to the entire continent.

The upshot of this fact is that in most cases of actual co-existence between BSS service and MDS America's terrestrial service internationally, the terrestrial frequency overlaps a BSS frequency that contains programming that is not intended for that region. This is best illustrated by an example: MDS America claims to operate an MVDDS system in Andorra at 12084.5 MHz, and claims that this service co-exists with DBS service downlinked from the Astra 1H satellite. Current programming on the Astra 1H overlapping channels 83 and 84, however, is *Premiere World*, a German language service – so it should be no surprise that not one BSS

¹⁰ See Comments of MDS America Incorporated (Mar. 12, 2001), Appendix 2.

¹¹ By way of reference, BSS service providers in the United States, located in ITU Region 2, use the 12 GHz Band to downlink programming to subscribers. In ITU Region 1, the BSS is allocated the 11.7-12.5 GHz band for downlinks and in ITU Region 3 the BSS is allocated the 11.7-12.2 GHz band for downlinks.

customer in Andorra (where the spoken languages are Catalan, Spanish and French) called to complain that he or she was having trouble watching “*South Park – Der Film*” because of terrestrial interference. Similarly, in Lyon, France, where MDS America claims to have used higher power levels on its terrestrial transmitters for eight years “without any complaints, whatsoever, from DBS customers,”¹² MDS America neglects to mention that its alleged co-frequency operations with BSS there have been with Astra 1G’s channel 114 at 12640 MHz. This Astra channel carries Internet service from @Internet via the Sky, which of course is a very different service from digital television (where interference artifacts are obvious). It would be extremely difficult for an Internet user to distinguish terrestrial interference from normal Internet hiccups. Moreover, it is dubious as to whether MDS America has ever even operated on a co-frequency basis in Lyon.¹³ Thus, the Lyon experience cited by MDS America is hardly a compelling example of successful terrestrial-BSS sharing.

B. MDS America’s Proposal To Hike MVDDS EIRP Limits In Rural Areas Is Unworkable And Exponentially Worsens MVDDS Interference Into Rural DBS Service

Credibility aside, MDS America’s main technical proposal is for the Commission to increase MVDDS transmitter EIRP from 14 dBm to 39 dBm in rural areas. Although MDS America asserts that this higher rural EIRP level will give MVDDS operators “flexibility in designing their systems to prevent harmful interference to DBS customers in rural areas,”¹⁴ this statement – which is like saying that one can *decrease* the amount of interference into another service by turning *up* the power – is not merely counter-intuitive, it is nonsensical. In actuality,

¹² MDS America Petition at 5.

¹³ See Northpoint June 7, 2001 *ex parte* letter at 4.

¹⁴ MDS America Petition at 6.

MDS America's higher EIRP will dramatically increase the amount of interference into DBS receivers, to the extreme detriment of rural DBS subscribers.

Table 1 below shows distances between an MVDDS transmitter and a DBS receiver that would be necessary to meet the current equivalent power flux density ("EPFD") limits specified in the Commission's rules. The table presents the bounding cases of EIRP, EPFD limit, and receive off-axis antenna gain. $G(\theta)$, the DBS receive antenna off-axis gain towards the MVDDS transmitter, has a value of approximately 0 dB at the backlobes, the area most susceptible to interference. $G(\theta)$ of -5 dB is the lowest gain of the antenna gain mask in Recommendation ITU-R B.O. 1213, the mask that is accepted and widely used by BSS operators worldwide.

Case	MVDDS EIRP, dBm	epfd Limit (4 kHz)	$G(\theta)$	Gmax	pfd (4 kHz)	Required $1/R^2$ Loss, dB	Required Distance, km
1	14	-168.4	0	34	-134.4	-80.6	3.02
2	39	-168.4	0	34	-134.4	-105.6	53.75
3	14	-168.4	-5	34	-129.4	-75.6	1.70
4	39	-168.4	-5	34	-129.4	-100.6	30.23
5	14	-172.1	0	34	-138.1	-84.3	4.63
6	39	-172.1	0	34	-138.1	-109.3	82.30
7	14	-172.1	-5	34	-133.1	-79.3	2.60
8	39	-172.1	-5	34	-133.1	-104.3	46.28

Table 1. Distance Required Between an MVDDS Transmitter and DBS Subscribers

Case 1 represents the current MVDDS EIRP limit of 14 dBm, the East EPFD limit, and a DBS receiver off-axis gain of 0 dB. The resulting separation distance is 3 km. This means that an MVDDS transmitter could not be placed within three kilometers of a DBS customer if it would intersect *any* DBS receiver backlobe. If the MVDDS EIRP is raised to 39 dBm, as MDS America proposes, the transmitter could not be placed *within 53 km* of a DBS customer and still

meet the Commission's EPFD limits (Case 2). And these distances were calculated for the highest EPFD limit. For the case of 39 dBm EIRP and the lowest EPFD limit of -172.1 dBW/(m² · 4 kHz), the required separation distance would be *46 km at a minimum, and 82 km if the MVDDS transmitter beam intersected any DBS receiver backlobe.*

As the DBS Operators have already pointed out in their own petition for reconsideration, the Commission's EPFD limits, purportedly implemented to ensure that DBS subscribers do not experience harmful interference, are already too high to achieve this purpose.¹⁵ Permitting any further incursion into these EPFD limits is simply intolerable from a DBS service availability standpoint – *especially* for rural subscribers. The basic nature of satellite programming delivery with nationwide coverage beams makes DBS an ideal infrastructure for the delivery of MVPD and other advanced services to rural consumers. Unlike MDS America, however, the DBS Operators have been delivering and expanding service to rural America since the inception of DBS in 1994. MDS America's attempts to wrap itself in the mantle of rural service should not obscure the basic fact that the power increase it proposes in rural areas will cause real harm to rural DBS subscribers. That result emphatically is not in the public interest.

Moreover, from an MVDDS perspective, if rural DBS subscribers are to be protected at least to the level specified in the Commission's current EPFD limits, then it is difficult to see how the higher EIRP level that MDS America proposes could possibly foster reasonable co-existence with DBS. To provide rural service, an MVDDS operator would still need to locate its transmitter in an area where there is a sufficient population from which to draw customers. However, in order to ensure non-interference with rural DBS subscribers, operating at a 39 dBm

¹⁵ See Joint Petition of EchoStar Satellite Corporation and DIRECTV, Inc. for Reconsideration of Second Report and Order, ET Docket No. 98-206 (July 26, 2002).

EIRP, the MVDDS operator would also need to ensure that there is not a single DBS subscriber within *40-80 kilometers* of the transmitter. This is hardly a viable sharing scenario.

There is another level of unworkability to MDS America's rural EPFD proposal. Throughout its petition, MDS America attempts to contrast the "finesse" and "elegance" of its MVDDS sharing approach with the "brute force" approach of Northpoint,¹⁶ which MDS America acknowledges will cause "interference problems for DBS users."¹⁷ MDS America proposes the use of terrestrial repeaters to re-transmit signals to areas under the main beam of the MVDDS transmitter. There is nothing particularly innovative about the use of terrestrial repeaters to enhance signal coverage. But given the lack of specificity regarding the parameters of these repeaters (EIRP, height, direction, etc.), it is not possible to determine with precision the level of interference that MDS America's proposed system would cause to DBS subscribers, or to evaluate the relative strengths and weaknesses of MDS America's approach as compared to Northpoint's. Nevertheless, the Commission should recognize that each repeater would be another source of interference to DBS subscribers.

Moreover, because the Commission purposely did not mandate one particular MVDDS technology over another, under MDS America's proposal, an increased EIRP could be used in *both* Northpoint's and MDS America's system designs. Accepting MDS America's critique of Northpoint's system, which MDS America criticizes as interfering with DBS systems under the current rules, even MDS America must concede that the combination of higher EIRP limits with Northpoint's "brute force" approach would have a devastating effect on DBS subscribers.

Finally, MDS America makes the puzzling assertion in support of its proposal that "urban systems that are attempted [by MVDDS system designers] will be much more likely to interfere

¹⁶ See, e.g., MDS America Petition at 13.

¹⁷ *Id.* at 19.

with existing DBS systems [under the Commission's current rules] than if there were two standards with much higher EIRP levels for rural systems" as MDS America proposes.¹⁸

Again, this statement makes little sense. The degree of interference into DBS installations posed by urban MVDDS systems with a specific EIRP limit is what it is: MDS America does not explain how permitting MVDDS operators to hike their power in Wolbach, Nebraska can possibly decrease MVDDS interference in New York City. Logically, the two cases are entirely unrelated.

C. MDS America's Proposal To Increase MVDDS EPFD Limits In Rural Areas Will Increase DBS Subscribers' Service Unavailability By More Than 100%

MDS America also proposes to raise dramatically the EPFD limits for MVDDS systems in rural areas. However, MDS America's proposed rural EPFD limits would produce C/I ratios of 12 to 13 dB, yielding outage increases of *more than 100%* for rural DBS customers. Such parameters would clearly be devastating to rural DBS subscribers' receipt of DBS service and should be rejected.

III. PEGASUS'S ATTEMPT TO NARROW THE POOL OF ELIGIBLE MVDDS AUCTION APPLICANTS TO ONLY TWO ENTITIES SHOULD BE REJECTED

Pegasus's petition is focused on a single issue related to the assignment of MVDDS licenses: although Pegasus vigorously (and correctly) opposed Northpoint's efforts to avoid an auction so that only Northpoint would gain access to MVDDS licenses, Pegasus now claims (after six pages of background but only two paragraphs of analysis) that Congress in the Local TV Act conveniently intervened to "mandate" that the Commission expand the potential pool of

¹⁸ MDS America Petition at 9.

MVDDS applicants from one to two, so as to include Northpoint *and* Pegasus but no one else.¹⁹

Pegasus's argument here does not pass the "straight-face" test.

As the Commission noted in the *Second Report and Order*, before it cuts off acceptance of license applications for a particular frequency band, it must give the public adequate notice of its plan to do so,²⁰ and such notice must be "reasonably comprehensible to people of good faith."²¹ Pegasus is very familiar with this principle. It was less than two years ago, in the context of Northpoint arguing that *it* should be the only MVDDS licensee, that Pegasus argued to the Commission:

Northpoint wishfully asserts that the *SkyBridge Cut-Off Notice* was the relevant cut-off for terrestrial applications in the Ku band, even though by its express terms the notice applied only to applications for certain satellite earth stations or space stations. Northpoint's creative reading of the SkyBridge Cut-Off Notice also ignores basic principles of the Communications Act, which require the Commission to provide public notice of an application deadline that clearly informs potentially interested parties of the approaching deadline and its scope.²²

Now, having prevailed in making an argument that gets Pegasus in the door to apply for MVDDS licenses, Pegasus quickly wishes to shut that door tightly behind it. Although interested parties have not yet been afforded the opportunity to apply for MVDDS licenses that

¹⁹ Pegasus Petition at 2 (arguing that "limiting the licensing of MVDDS spectrum to the two qualified entities . . . will greatly speed the introduction of service").

²⁰ *Second Report and Order* at ¶ 211.

²¹ *Id.* at ¶ 213 (citing *Radio Athens v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968)).

²² Pegasus Broadband Corporation, *Response to Ex Parte Submission of Northpoint Technology, Ltd. and Broadwave USA*, ET-Docket 98-206 (filed Sep. 21, 2000). (Pegasus 2000 *Ex Parte*).

Pegasus previously claimed was so important,²³ Pegasus now argues that Congressional intervention has settled the issue. Specifically, citing Section 1012 of the Local TV Act,²⁴ Pegasus suggests that Congress took the drastic and highly unusual step of ordering the Commission to grant valuable wireless licenses to two then-pending applicants without ever soliciting competing applications from other interested parties. This position, however, is not supported by the statutory text, legislative history, structure or purpose of Section 1012.

First, as Pegasus itself noted two years ago, granting licenses without a proper filing window “ignores basic principles of the Communications Act, which require the Commission to provide public notice of an application deadline that clearly informs potentially interested parties of the approaching deadline and its scope.” Given the dramatic and unusual change in the status quo that Pegasus now urges the Commission to find has taken place, the burden of persuasion clearly falls on Pegasus.²⁵

²³ Quite to the contrary, the record shows that the *Ku-Band Cut-Off Notice* established a specific cut-off date for satellite users, but was “completely silent with regard to terrestrial use of the Ku-band.” *Second Report and Order* at ¶ 213. The Commission has properly noted that silence cannot serve as adequate notice (by inference). *Second Report and Order* at ¶ 214.

²⁴ Pegasus Petition at 2, 6.

²⁵ See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) (“A party contending that legislative action [has] changed settled law has the burden of showing that the legislature intended such a change.”). *Accord Tome v. United States*, 513 U.S. 150, 163 (1995). If Congress really intended to make a drastic change to Commission policy it is highly likely that it would have said so in some manner, or would at least have discussed it or commented on it in some fashion. See, e.g., *Chisolm v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (“We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history . . . Congress’ silence in this regard can be likened to the dog that did not bark.”).

Pegasus cannot meet this burden. Section 1012 is a straightforward provision²⁶ that does not implicate at all established Commission license assignment practices, let alone override them. On its face, Subsection 1012(a) does nothing more than set forth a general, ongoing obligation for the Commission to test the technology of entities that may submit applications (now or in the future) to provide terrestrial service in the DBS downlink band,²⁷ while Subsection 1012(b) gives the Commission specific instructions to deal with terrestrial service applications that happened to be pending at the time of the statute's enactment.²⁸ Looking to this language and the structure of Section 1012, there is no basis to conclude, as Pegasus

²⁶ Titled "Prevention Of Interference To Direct Broadcast Satellite Services."

²⁷ Subsection 1012(a) states:

"Testing for Harmful Interference — The Federal Communications Commission shall provide for an independent technical demonstration of any terrestrial service technology proposed by any entity that has filed an application to provide terrestrial service in the direct broadcast satellite frequency band to determine whether the terrestrial service technology proposed to be provided by that entity will cause harmful interference to any direct broadcast satellite service."

²⁸ Subsection 1012(b) states:

"Technical Demonstration— In order to satisfy the requirement of subsection (a) for any pending application, the Commission shall select an engineering firm or other qualified entity independent of any interested party based on a recommendation made by the Institute of Electrical and Electronics Engineers (IEEE), or a similar independent professional organization, to perform the technical demonstration or analysis. The demonstration shall be concluded within 60 days after the date of enactment of this Act and shall be subject to public notice and comment for not more than 30 days thereafter."

suggests, that Congress was explicitly ordering the Commission to “*limit* terrestrial Ku-band applications to those already on file and validated by independent testing.”²⁹

Even Satellite Receivers, the third MVDDS applicant whose pending applications were dismissed along with those of Pegasus and Northpoint, acknowledges that Pegasus’s position cannot be persuasively maintained in view of what Section 1012 actually says. As Satellite Receivers observes, Pegasus “relies on language that is not found in the LOCAL TV Act,” and notes that “Pegasus does not cite a provision in the LOCAL TV Act that limits the licensing of MVDDS to participants in the independent testing.”³⁰ That is because no such provision exists.

The Commission should not adopt Pegasus’s position because to do so would also contradict the purpose of Congress in various respects. First, the intent of Section 1012 is clearly

²⁹ Pegasus Petition at 2 (emphasis added). Pegasus’s attempt to explain away the fact that Congress never used any of the words Pegasus wanted boils down to a claim that Congress did not say, but rather implied, what it was that Pegasus wanted to hear. Specifically, Pegasus argues that “Congress did not need to be any more explicit.” Pegasus Petition at 7. This argument, however, is belied by Pegasus’s own speculation that “Congress did not address what future applicants would need to do, *presumably because it did not anticipate that there would be any such future applicants.*” Pegasus Petition at 6 (emphasis added). In fact, it is far more likely that Congress “did not address what future applicants would need to do” because Congress was not changing the status quo in any way.

³⁰ Satellite Receivers, Ltd. (“Satellite Receivers”), *Opposition to Petition for Reconsideration*, ET Docket 98-206 (June 12, 2002).

to protect DBS operators and their subscribers from harmful terrestrial interference.³¹ This purpose is obvious from the plain text of the statute, its title,³² and what little legislative history³³ there is on this small section of the statute: Section 1012 is about protecting DBS from untested terrestrial technology. It is not about overriding the Commission's normal license assignment procedures,³⁴ nor does it order that a particular group of applicants be accorded what is in effect

³¹ See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))).

³² "Prevention Of Interference To Direct Broadcast Satellite Services." (Pegasus conveniently fails to cite this in its petition despite otherwise citing the text.)

³³ The LOCAL TV Act of 2000 was passed into law as Title X of P.L. 106-553, entitled "DC Appropriations FY 2001," as part of an omnibus spending bill. The Act began as S. 2097 in the Senate and H.R. 3615 in the House. The House Report shows that the precursor to Section 1012 was not concerned with forcing the Commission to grant licenses outside its normal procedures but was instead focused exclusively on the "prevention of interference to satellite services." The operative text of the House version read as follows:

Section 11 forbids the Board from approving a loan guarantee under the Act until the FCC has determined on the basis of a technical demonstration or, if infeasible, an analysis, that any terrestrial service proposing to operate in the satellite broadcast frequency band will not cause harmful interference to any satellite service eligible for a loan guarantee under the Act.

House Report, 106th Congress, 2d Sess., Rept. 106-508, Part 2, p. 28. The remainder of the House text set forth a requirement for independent testing and a requirement that it be completed within 90 days.

³⁴ Recognizing "the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so," *Jones v. United States*, 526 U.S. 227, 234 (1999), Pegasus's interpretation of Section 1012 is highly improbable in that it directly conflicts with Section 309(j) of the Communications Act, which generally requires the Commission to allocate mutually exclusive wireless licenses by competitive bidding. Giving away MVDDS licenses in the manner Pegasus urges would represent a sharp deviation from this settled policy. On the other hand, rejecting Pegasus's strained interpretation of Section 1012 allows Sections 1012 and 309(j) to coexist in harmony, as they are intended to be absent a expression to the contrary from Congress. See *Astoria Fed'l Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)

a “pioneer’s preference” for valuable licenses granted outside of the Commission’s usual license assignment processes. To the contrary, Congress and the Commission have expressly abandoned that concept.³⁵

The DBS Operators join Satellite Receivers in urging denial of Pegasus’s reconsideration petition. To the extent that the Commission proceeds in assigning MVDDS licenses next year at all, the decisions to assign those licenses via competitive bidding procedures and to invite a wide universe of potential applicants to participate in the bidding process (including DBS providers) are correct ones. They should not be revisited.

IV. CONCLUSION

For the foregoing reasons, the petitions for reconsideration of MDS America and Pegasus should be denied.

("[L]egislative repeals by implication will not be recognized, insofar as two statutes are capable of coexistence, absent a clearly expressed congressional intention to the contrary.").

³⁵ See *Second Report and Order* (Commission agrees “with those commenters who argue that we do not have statutory authority to award an entity a license for a non-auction-exempt service without the use of competitive bidding solely based on its innovative technology, and such action would be inconsistent with Congress’s intent in abolishing the Pioneer’s Preference program.”) (citing 47 U.S.C. § 309(j)(13(F))).

Respectfully submitted,

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Dated: September 3, 2002

DECLARATION OF DAVID A. PATTILLO

I, David A. Pattillo, hereby declare as follows:

1. I am employed by DIRECTV, Inc. I am an engineer by training and am familiar with the technical and interference characteristics of DIRECTV's Direct Broadcast Satellite system, the technical requirements of Federal Communications Commission and International Telecommunications Union rules, and the interference and technical issues referenced in the foregoing filing.

2. I have reviewed the foregoing filing from a technical perspective, and the information found therein is true and accurate to the best of my knowledge, information and belief.

A handwritten signature in black ink, appearing to read 'David A. Pattillo', is written over a horizontal line.

David A. Pattillo
DIRECTV, Inc.

June 17, 2002

EXHIBIT 1

Purported MDS America-DBS Sharing Scenarios In Other Countries

Item	MVDDS Location	MVDDS Frequency MHz	DBS Satellite	Satellite Channel Frequencies as listed by MDS	DBS Receive Antenna Size, cm.	DBS Programming	Comments
	Australia/New Zealand Overlap						
1	Auckland, NZ	12338-12410	Panamsat 8	12326	-	-	No Ku-band service in New Zealand.
2	Auckland, NZ	12338-12410	Panamsat 8	12330	-	-	No Ku-band service in New Zealand.
3	Auckland, NZ	12338-12410	Panamsat 8	12366	-	-	No Ku-band service in New Zealand.
4	Auckland, NZ	12338-12410	Panamsat 8	12394	-	-	No Ku-band service in New Zealand.
5	Auckland, NZ	12338-12410	Panamsat 8	12400	-	-	No Ku-band service in New Zealand.
6	Auckland, NZ	12338-12410	Panamsat 8	12422	-	-	No Ku-band service in New Zealand.
7	Auckland, NZ	12338-12410	Panamsat 8	12446	-	-	No Ku-band service in New Zealand.
8	Auckland, NZ	12338-12410	Optus B1	12316	-	-	Australian beam only. NZ not covered
9	Auckland, NZ	12338-12410	Optus B1	12326	-	-	Australian beam only. NZ not covered
10	Auckland, NZ	12338-12410	Optus B1	12331	-	-	Australian beam only. NZ not covered
11	Auckland, NZ	12338-12410	Optus B1	12336	-	-	Australian beam only. NZ not covered
12	Auckland, NZ	12338-12410	Optus B1	12354	-	-	Australian beam only. NZ not covered
13	Auckland, NZ	12338-12410	Optus B1	12360	-	-	Australian beam only. NZ not covered
14	Auckland, NZ	12338-12410	Optus B1	12386	-	-	Australian beam only. NZ not covered
15	Auckland, NZ	12338-12410	Optus B1	12404	75	Mediasat	AUS/NZ beam. Only 1/2 of satellite transponder overlaps MDS.
16	Auckland, NZ	12338-12410	Optus B1	12415	-	Feeds	Not used for DTH reception
17	Auckland, NZ	12338-12410	Optus B1	12424	-	Feeds	Not used for DTH reception
18	Auckland, NZ	12338-12410	Optus B1	12430	-	Feeds	Not used for DTH reception
19	Auckland, NZ	12338-12410	Optus B1	12488	-	-	Australian beam only. NZ not covered

Item	MVDDS Location	MVDDS Frequency MHz	DBS Satellite	Satellite Channel Frequencies as listed by MDS	DBS Receive Antenna Size, cm.	DBS Programming	Comments
20	Auckland, NZ	12338-12410	Optus B3	12336	-	-	Australian beam only. NZ not covered
21	Auckland, NZ	12338-12410	Optus B3	12369	-	-	Australian beam only. NZ not covered
22	Auckland, NZ	12338-12410	Optus B3	12376	-	-	Australian beam only. NZ not covered
23	Auckland, NZ	12338-12410	Optus B3	12407	75	Optus Aurora	AUS/NZ beam. Only ½ of satellite transponder overlaps MDS.
24	Auckland, NZ	12338-12410	Optus B3	12438	-	-	Australian beam only. NZ not covered
	European Overlap						
25	Macedonia	11789.5	Astra 1F	11758 (67)	>120	Premiere World	Outside Astra 1F coverage zone. German programming. Not available in Macedonia.
26	Macedonia	11789.5	Astra 1F	11798 (69)	>120	Premiere World	Outside Astra 1F coverage zone. German programming. Not available in Macedonia.
27	Macedonia	11789.5	Astra 1G	11778 (68)	>120	CanalSatellite France	Outside Astra 1G coverage zone. French programming. Not available in Macedonia.
28	Macedonia	11789.5	Astra 1G	11817 (70)	>120	CanalSatellite France	Outside Astra 1G coverage zone. French programming. Not available in Macedonia.
29	Macedonia	11789.5	Astra 1G	11836 (71)	>120	ARD	Outside Astra 1G coverage zone. Dutch programming. Not available in Macedonia.
30	Macedonia	11789.5	Astra 2A	11758 (3)	>120	Sky Digital (BSkyB)	Outside Astra 2A coverage zone.
31	Macedonia	11789.5	Astra 2A	11778 (4)	>120	Sky Digital (BSkyB)	Outside Astra 2A coverage zone.
32	Macedonia	11789.5	Astra 2A	11798 (5)	75-120	Sky Digital (BSkyB)	British programming. Not available in Macedonia.
33	Macedonia	11789.5	Astra 2A	11817 (6)	75-120	Sky Digital (BSkyB)	British programming. Not available in Macedonia.
34	Macedonia	11789.5	Astra 2A	11836.5 (7)	>120	Sky Digital (BSkyB)	Outside Astra 2A coverage zone.
35	Macedonia	11789.5	Hot Bird 2	11746.66 (51)	>120	Dubai Mix	Dubai programming.
36	Macedonia	11789.5	Hot Bird 2	11765.84 (52)	>120	RAI	Italian programming.
37	Macedonia	11789.5	Hot Bird 2	11758.02 (53)	>120	Canal 24 Horas	Spanish programming
38	Macedonia	11789.5	Hot Bird 2	11804.20 (54)	>120	RAI	Italian programming

Item	MVDDS Location	MVDDS Frequency MHz	DBS Satellite	Satellite Channel Frequencies as listed by MDS	DBS Receive Antenna Size, cm.	DBS Programming	Comments
39	Macedonia	11789.5	Hot Bird 2	11823.38 (55)	>120	Nova	Greek programming.
40	Serbia	11907	Astra 1G	11895 (74)	90-120	Canal Satélite Digital	Italian programming. Not available in Serbia.
41	Serbia	11907	Astra 1H	11914.5 (75)	75-120	No Provider name given	German music. Not available in Serbia.
42	Serbia	11907	Astra 1F	11934 (76)	90-120	Canal Satélite Digital	Italian programming. Not available in Serbia.
43	Serbia	11907	Hot Bird 2	11900.10 (59)	90-120?	D+	Italian programming. Not available in Serbia.
44	Ireland	12355	Astra 1F	12304.5 (95)	60-120	UPC Direct	DTH service in Central Europe. Does not cover Ireland.
45	Ireland	12355	Astra 1F	12382.5 (99)	60-120	UPC Direct	DTH service in Central Europe. Does not cover Ireland.
46	Ireland	12355	Astra 1H	12343.5 (97)	60-90	Canal Digitaal Satelliet	Dutch programming.
47	Ireland	12355	Astra 1H	12363 (98)	60-90	CanalSatellite France	French programming.
48	Andorra	12084.5	Astra 1H	12070.5 (83)	50-60	Premiere World	German programming.
49	Andorra	12084.5	Astra 1H	12090 (84)	50-60	Premiere World	German programming.
50	Lyon, France	12645	Astra 1G	12640 (114)	50	@Internet via the Sky	Internet
	Central Asian Overlap						
51	Almaty, Kazakhstan	12750-12775	Eurasiasat 1	12731 (34)	>120	No programming listed	Almaty is outside Eurasiasat 1 coverage.
	North East Asian Overlap						
52	Korea	12500-12750	Koreasat 3	12550	60?	Korean TV	Insufficient information on satellite and MDS systems to evaluate sharing.
53	Korea	12500-12750	Koreasat 3	12730	60?	Korean TV	Insufficient information on satellite and MDS systems to evaluate sharing.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2002, a true and correct copy of the foregoing was served by first-class United States mail, postage prepaid, on the following individuals:

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